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IN THE
SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1991

BARBARA HACKMAN FRANKLIN,
Secretary of Commerce, et al.,

Appellant,

v.

MASSACHUSETTS, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

REPLY MEMORANDUM OF AMICUS, STATE OF WASHINGTON TO APPELLEES' OPPOSITION TO APPLICATION FOR A STAY PENDING APPEAL

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INTRODUCTION

As authorized by this Court's Order of March 20, 1992, the State of Washington submits this Reply Brief,[1] accompanied by three election officials' Affidavits which rebut Appellees' mischaracterization of Washington's electoral process and interest in retaining the status quo while this litigation is resolved. Washington and its citizens and candidates will suffer

[1] Massachusetts' forty-seven page Brief and Affidavits were not received by Washington until March 23, 1992.

irreparable harm if the stay is not granted. The Order below is intended to destroy Washington's Redistricting Plan for nine United States House districts. This Plan was finally completed through a Washington constitutional procedure using a Commission instead of the Legislature. Washington so proceeded, of course, in reliance upon the Clerk's issuance of a Certificate of Entitlement. Its candidates and citizens have also proceeded in reliance on the Certificate and the Plan it supports.

1. The Balance of Harm Strongly Favors Washington

Massachusetts' contention that the balance of harm strongly favors it is based upon an inaccurate statement of Washington's election laws.[2] (Appellee's Brief in Opposition, pp. 14-17.) A more complete description of Washington's election system and laws is set forth below, and in the attached Affidavit of Gary McIntosh, Director, Elections Division, Secretary of State of the State of Washington.

As noted, congressional district lines were drawn by Washington's Redistricting Commission. Affidavit of Jennifer Helget, Executive Director, Washington Redistricting Commission. Washington law requires precinct boundaries to coincide with congressional district boundaries. Wash. Rev. Code § 29.04.050 (1989). They were adjusted to do so. Redrawing of

[2] Massachusetts' Stafford Affidavit is allegedly based on conversation(s) with a Washington employee. Setting aside ethical and evidentiary problems, the information in that affidavit does not accurately summarize Washington's election law.

congressional district boundaries would now require that voting precinct boundaries be modified. Many state and local election district boundaries will thus require adjustment.

Under state law, precinct boundaries can only be changed by county legislative authorities, requiring eight to ten weeks notice and process. Affidavit of McIntosh, p. 3. Precinct boundaries may not be altered at all after the thirtieth day prior to the first day for candidates to file for the primary election. Wash. Rev. Code § 29.04.040 (1989). This means that the county ordinance establishing precinct boundaries may not be modified after June 27, 1992. Affidavit of McIntosh, pp. 2-3.

The claim that "Washington (which) has a short and unstructured primary process, would not suffer any irreparable harm even without a stay" (Appellee's Brief in Opposition, p. 14) is false. Massachusetts' description of Washington's primary election process is distorted by significant omissions. Washington law requires that candidates other than those from the two major political parties file by June 17, at least ten days prior to convening a convention for the purpose of candidate nomination. Wash. Rev. Code § 29.24.020 (1989). Independent and minor parties are a frequent, and welcome, part of Washington politics. Munro v. Socialist Workers, 479 U.S. 189 (1986).

Many candidates for Washington's nine congressional seats have already announced their decision to give up other elective positions presently held. Affidavit of McIntosh, pp. 3-5. The upward aspirational mobility of many candidates has been set in motion by these commitments to run for Congress as others move to

fill vacant elective offices. If the ninth seat is removed at this late date, reversing this domino effect is impossible because of state law filing deadlines and other practical problems.[3]

Massachusetts' Brief also totally ignores federal election law that requires financial reporting by any candidate for federal office who raises or spends more than $5,000. 2 U.S.C. § 434(2)(A)(iii); § 431(2)(A). Under 2 U.S.C. § 431(e)(1), candidates must designate a committee within fifteen days of becoming a "candidate" (when $5,000 is raised). The records of the Public Disclosure Commission reveal that as of March 3, 1992, Washington already has twenty-six declared, filed candidates, nineteen for House of Representatives' positions in all newly-created congressional districts. Affidavit of Paul Gillie. Those candidates for the House of Representatives had already expended nearly $600,000 on campaigning. Massachusetts' claim that there is no harm to Washington citizens and candidates is false.[4]

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[3] The political burdens faced by a candidate of re-declaring for his or her former elected position, and the consequent effect upon others vying for that position demonstrate the degree of their reliance upon the Clerk's issuance of Washington's Certificate of Entitlement over a year ago and the practical difficulty of adjustment at this late date. Affidavit of McIntosh, pp. 2-3.

[4] Massachusetts' claim of "Washington's relatively passivity" (Appellees Brief in Opposition at 13) in this case or the census litigation generally is consciously false. Washington has filed its own litigation to defend the finality of its Certificate of Entitlement. Washington v. United States Dep't of Commerce, No. 91-315 (D. Wash. filed Mar. 7, 1991). Washington

(Footnote continues on next page)

The required election filings have been made in reliance upon the finality of this redistricting by candidates who have already spent substantial sums and otherwise commenced campaigns for election as a United States Representative in each of the nine districts. Affidavit of McIntosh at pp. 2-3 and Affidavit of Gillie at pp. 1-2.

Moreover, Massachusetts ignores the functioning of Washington's Constitutional Redistricting Commission.[5] As demonstrated by the Affidavit of Helget, the Redistricting Commission spent substantial time and money in its deliberations which culminated in re-drawing the boundaries of Washington's nine congressional districts. Washington has most certainly relied upon the Clerk of the House of Representative's Certificate that it is entitled to nine congressional seats.[6]

(Footnote continued from previous page)
has also filed amicus briefs in each major census case. Montana v. United States Dep't of Commerce, 775 F. Supp. 1358 (D. Mont. filed Oct. 18, 1991) cert. granted 60 U.S.L.W. 3435 (U.S. Dec. 16, 1991) (No. 91-860); New York v. United States Dep't of Commerce, 813 F. Supp. 48 (1990) (D. N.Y. filed Nov. 7, 1988); Massachusetts v. Mosbacher, ____ F. Supp. ____ (No. 91-11234 WD) (D. Mass. Feb. 20, 1992). No reply to Massachusetts' last brief below was filed only because Massachusetts' Brief was received three days after the court's decision.

[5] Amendment 74 to Washington's Constitution changed article 2, section 43 by creating a Redistricting Commission which, inter alia, had the duty of redrawing congressional and legislative election districts by a specified (and past) deadline.

[6] Washington's Legislature adjourned, sine die, on March 12, 1992. To initiate a new redistricting plan for Washington requires a special session of the Legislature and a special act to reconvene the Redistricting Commission (Wash. Rev. Code §

(Footnote continues on next page)

Id., pp. 2-3.

2. Threshold Standards For Issuance of a Stay Order Have Been Met

Massachusetts agrees that the threshold requirement to qualify for a stay is (was) to demonstrate a reasonable probability that four members of the Court will consider the issue sufficiently meritorious to note probable jurisdiction. (Appellee's Brief in Opposition, pp. 23-24.) On Friday, March 20, 1992, the Court noted probable jurisdiction on this appeal and set a briefing schedule and date for oral argument. By taking this action, the Court also satisfied the requirement that there is at least a fair prospect that five justices will conclude that the case was erroneously decided below. Lucas v. Townsend, 486 U.S. 1301, 100 L. Ed. 2d 589, 108 S. Ct. 1763, 1764 (Kennedy, Circuit Justice 1988).

3. A Stay Will Preserve The Status Quo Ante

As of January 1991, and as of today, Washington was, and is, entitled to nine seats, and Massachusetts to ten. As of April 10, the lower court's Orders unless stayed will change that status quo. The relief ordered by the district court acts to upset the status quo ante explicitly required by Congress in 2 U.S.C. § 2(a).

(Footnote continued from previous page)
44.05.120 (1989)). The present possibility of a legislative change to the final nine seat Redistricting Plan is remote.

As pointed out in our supporting affidavits, Washington proceeded to redistrict in reliance upon the Certificate of Entitlement issued January 16, 1991 by the Clerk of the House which provided Washington nine seats. The effect of the lower court's decision is not only to rewrite 2 U.S.C. § 2(a) standards for issuance of Certificates of Entitlement, but explicitly to require new Certificates of Entitlement for Washington and Massachusetts, thus resurrecting the 1980 entitlement for both (even though the states' absolute and relative populations have changed dramatically).

Candidates for public office have accordingly made their decisions based upon the 1991 reality of nine seats. Public and private monies have been spent in reliance upon the President's action and the House Clerk's issuance of Certificates of Entitlement. The status quo ante, prior to Massachusetts' claim, was that Washington was entitled to nine House seats and this will most definitely be altered by the lower court's Order, if not stayed.

Neither is it a valid argument to say that Washington was "on notice" of Massachusetts' and Montana's claims and therefore could not have justifiably relied upon the House Clerk's issuance of Certificates. (Appellee's Brief in Opposition, p. 13.) As occurs each decade, there are numerous cases involving census and apportionment. Even now there is also a New York "adjustment" claim as well as Washington's own lawsuit pending. Washington v. United States Dep't of Commerce, No. C91-315 (D. Wash. filed Mar. 7, 1991.) These actions could have the effect of further

confirming Washington's already final Entitlement (and Massachusetts' loss).

Washington and its candidates and citizens were justified in relying on the actual Certificate of Entitlement issued by the House Clerk in accordance with federal law rather than attempting to plan for each result of this proliferating litigation. As noted above, Washington can legally only make a redistricting plan based upon the census results and Certificate received.

4. The Public Interest Favors Stay

There is a strong public interest in the integrity and finality of the federal reapportionment process. The equal representation rights of the overseas citizens deprived of representation by the Orders below alone override the concerns raised by Massachusetts. It bears notice that Massachusetts argues to deprive over 10,000 of its own citizens of representation just because Washington has an even larger number of temporarily overseas citizens.

The final point is that these are substantial federal questions of public interest presented by this appeal. The statutory requirements for issuance of a Certificate of Entitlement to a House seat have been rewritten by the lower court's decision. The decision depriving persons serving their country of representation is also problematic in light of this Court's language in Carrington v. Rash, 380 U.S. 89 (1965) and Evans v. Cornman, 398 U.S. 419 (1970). These decisions suggest that military servicemen are entitled to protection of their

rights. Surely they are at least entitled to consideration, before an order has the effect of denying those rights.

The materials submitted by Washington demonstrate its reliance on the actions of the President and House Clerk pursuant to 2 U.S.C. § 2(a) and that irreparable harm will flow if this stay is not granted. Denial of the stay would burden Washington, one of the states that the federal statute was intended to protect, through providing finality to the process. There are clear public interests to be served by maintaining the status quo ante in terms of these duly issued Certificates of Entitlement, which strongly favor issuance of the stay.

> But where an injunction is asked which will adversely affect a public interest for whose impairment, even temporarily, an injunction bond cannot compensate, the Court may, in the public interest, withhold relief until a final determination of the rights of the parties, though postponement may be burdensome to the plaintiff. (footnote and citations omitted)

Yakus v. United States, 321 U.S. 414, 64 S. Ct. 660, 88 L. Ed. 834, 857 (1944). Washington's earlier Brief together with that of the United States Solicitor General, indicate that Massachusetts is ultimately unlikely to prevail in this Court.

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CONCLUSION

For the foregoing reasons, the application by the United States for a stay should be granted.

Dated this 25th day of March, 1992.

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